another appeal [1991] 1 MLJ 24 at p. 28. It was clear that if an objective standard had been applied the decision of the Deputy Minister not to return the car to the rightful owner in the light of the facts enumerated by Mr. Balaskanda was irrational being so outrageous in its defiance of logic and/or accepted moral standards that the consequence was manifest injustice caused to someone who was completely innocent of any wrong doing and had been deprived of property, his ownership of which was never in question. In the circumstances I was of the view that the Deputy Minister having professedly exercised good faith must then in rejecting the appeal have misdirected himself by failing to take into account self-evident facts favourable to the applicants.

I accordingly made an order in terms of the application.

R & I SECURITIES SDN.

v.

SYARIKAT TANAMAN DAN PERUSAHAAN PERAK SDN. BHD

HIGH COURT, JOHOR BAHRU
DATUK L.C. VOHRAH J.
[CIVIL SUIT NO. 277 OF 1979]
3 AUGUST 1992

CONTRACT: Agreement for sale and resale of shares - Fraudulent and illegal transaction - Knowledge of fraud and illegality - Effect - Consideration - Charge created after execution of agreement - Past consideration - Effect - Non-existence of subject matter of agreement - Whether claim enforceable - Breach of provisions of Exchange Control Act 1953 - Whether transaction legal.

An arrangement was entered into in May 1975 in which the plaintiff stockbroking company was to sell two blocks of shares by order and for account of HKSL to P and C, who were in turn to resell their respective shares at an enchanced price back to HKSL. The defendant executed documents upon which the defendant was alleged to have given a guarantee to the plaintiff for the purchase of the shares. In the event HKSL did not take up the shares, which were purportedly resold, on the ground that HKSL did not exist at all material times. The plaintiff claimed that the resale to HKSL was at the inducement and guarantee by the defendant that HKSL would pay for the shares. The defendant averred that the transaction was a sham, that no inducement was applied nor guarantee given. It further averred that the plaintiff had full knowledge of the fraudulent and illegal transaction, that the non-existence of HKSL made the inchoate charge instrument void and unenforceable and that the transaction contravened the exchange control legislation.

Held:

[1] The plaintiff was fully aware that this transaction was not a normal and a genuine stock exchange transaction.

[2] The charge and the Directors' resolution authorising the creation of the charge, having been executed well after the agreement in May 1975, the consideration given was past consideration and bad in law.

[3] The charge transaction was illegal and the claim unenforceable in view of the contravention of ss. 131, 132 and 133 Companies Act 1965 and the plaintiff must have been aware of this.

[4] The non-existence of HKSL as an entity avoided the transaction under s. 21 Contracts Act 1950 and made the claim unenforceable.

[5] The sums of money remitted outside Malaysia pursuant to the transaction was in contravention of ss. 8 and 9 Exchange Control Act 1953 thus rendering the transaction illegal.

[Suit dismissed with costs].

Case referred to:
Che Wan Development Sdn. Bhd. v. Co-operative Central Bank Bhd. [1990] 2 CLJ 35 / [1990] 2 MLJ 365 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 131, 132 & 133
Contracts Act 1950, s. 21
Exchange Control Act 1953, ss. 8 & 9

For the plaintiff - V.M. Mohan; M/s. V.M. Mohan
For the defendant - A.I. Raj; M/s. Raj Selva & Co.

JUDGMENT

L.C. Vohrah J:
In 1975 the plaintiff carried on business as a stockbroker at No. 65, Jalan Tan Hiok Nee, Johor Bahru. The defendant, which at the time carried on business at No. 66 next door to the plaintiff's, was a company wholly owned by Mosbert Berhad whose directors were also directors of the defendant. Some time in May of that year an arrangement was entered into whereby the plaintiff was to sell two blocks of shares, 2,350,667 Mosbert Berhad shares ("the Mosbert shares") and 120,000 Town and City Limited Properties shares ("the Town & City Shares"), by order and for account of Messrs. Hong Kong Securities Limited ("HKSL") purportedly registered in Hong Kong, to Patel Holdings Sdn. Bhd. ("Patel") having its registered office in Penang, and California Vegetable Oils Inc. ("California"), incorporated in the United States of America and having its registered office in the City of Hayward in the State of California. Both Patel and California were in turn to re-sell their respective shares at an enhanced price back to HKSL. Of these two blocks of shares Patel apparently bought on 27 May 1975 1,110,000 Mosbert shares at the price of RM699,188 whilst California on 29 May 1975 the remaining 1,250,667 Mosbert shares and the 120,000 Town & City shares for the total sum of RM1,001,729 which sum was to be settled in US$412,081. On 28 May 1975 Patel apparently re-sold its 1,100,000 Mosbert shares at the enhanced sum of RM752,735 on "special term", that is to say for delivery to be made on 28 August 1975. Likewise California on 30 May 1975 apparently re-sold its Mosbert shares and its Town & City shares for the total enhanced sum of RM1,125,502. In the event HKSL did not take up the Mosbert shares and the Town & City shares which were purportedly re-sold because no such entity existed in Hong Kong. The consequence was Civil Suit No. 606 of 1977 (D15) filed by Patel against the plaintiff in the High Court at Penang wherein Patel claimed the sum of RM752,735 with interest at 12% per annum for refusal to take delivery of the 1,100,000 Mosbert shares. Patel then made an application for summary judgment under O. 14 of the Rules of the High Court 1980 against the plaintiff which was dismissed. The plaintiff then applied to have the suit struck out but in the result the suit was finally settled by a consent order made on 7 November 1986 whereby, *inter alia*, judgment was entered in the suit for the amount claimed against the plaintiff and for the subrogation of all the plaintiff's rights and interests in the present suit to Patel. By a letter dated 6 July 1978 (P39A) all California's rights and claims against the plaintiff were assigned/subrogated to Patel.

In its short statement of claim the plaintiff alleged that the re-sale to HKSL was at "the inducement and guarantee by" the defendant that HKSL would pay for the shares and that the defendant "executed a charge in favour of" the plaintiff for the sum RM1,999,570.27 as security for the purchase of the Mosbert shares and the Town & City shares. The plaintiff further alleged that it wrote to HKSL to pick up the shares but HKSL "ignored, neglected and failed or refused to pay for the shares". The plaintiff admitted that the security given by way of the charge instrument could not be registered for want of consent from the State Authority.

The defendant in its long statement of defence averred, *inter alia*, that the transaction was a sham transaction; that no inducement was applied nor guarantee given; that the plaintiff had full knowledge of the fraudulent and illegal transaction; that the non-existence of HKSL made the inchoate charge instrument void and

unenforceable; and that the transaction contravened the exchange control legislation thus making the claim unenforceable.

It was clear from the evidence that it was one Tan See Chay (now deceased), the then general manager of South East Asia Development Corporation ("SEADCORP"), who arranged for the sale and re-sale of the two blocks of shares on behalf of Amos Dawe. He was in fact the prime-mover and negotiator of the deals. He was the intermediary between one Amos Dawe and Datuk K.K. Sharma (PW5) who acted as the agent for both Patel and California. It was also clear from the evidence of Syed Omar Alsagoff recently deceased (PW2), the manager of the plaintiff at the material time, that it was through his close association with Tan See Chay that the plaintiff was used to effect the sales to and re-sales by Patel and California. It was also clear from the evidence of the surviving partner of the plaintiff Idris bin Osman (PW1) that no money, scrips or transfers relating to these transactions went through the plaintiff as in a normal stockbroking transaction. PW1 admitted in his affidavit D14, which was successfully used in defending the application for summary judgment in the aforementioned Penang Civil Suit D15, that it was SEADCORP which actually acted as the brokering agent as it arranged for the transfer of the scrips and that these scrips never passed through the plaintiff. PW1 testified that for its pains the plaintiff was paid a commission only for the sale to Patel and California. From the evidence of Choh Yet (PW3), the alter ego of Dawe on the local scene, it was obvious that Dawe needed money for his group of companies and that 11,000,000 shares including the two blocks of shares were to be purchased by PW5 on behalf of his principals; that he had obtained a loan from PW5; and that it was Tan See Chay who arranged the deal between Dawe and PW5. I was satisfied on the facts adduced that the plaintiff had been used as a tool to confer respectability on a deal arranged by Tan See Chay between Dawe and PW5 and that the transaction was not a normal and genuine stock exchange transaction. I was also satisfied that the plaintiff was fully aware of the abnormal nature of the transaction as evidenced not only by the oral testimony of PW1 and PW2 to the effect that a guarantee and security had to be furnished by PW3 on behalf of Dawe, the actual vendor of the two blocks of shares, but also by the sworn averments in D14, an affidavit which was settled by solicitors on instructions given by PW1, who was "an active partner at the time" of the plaintiff, after he had discussed the matter with PW2. I was satisfied on a balance of probabilities that the deal was arranged by Tan See Chay to camouflage a transaction whereby monies were being raised for the use of Dawe by the purchase on the part of Patel and California of the two blocks of shares in consideration of their being re-sold to HKSL at an enhanced price. I found it hard to believe PW5, as one of the principal players in the deal, when he stated that he "did not know who the buyer and who the seller was behind the stockbroker". There was unchallenged evidence that Tan See Chay had been in communication with him and with Dawe by telephone when PW2 together with one Rahmat, the other partner of the plaintiff (now deceased), were at the SEADCORP office in Kuala Lumpur when the details of the transaction were discussed with the plaintiff's representatives. By his own admission he had asked Tan See Chay a series of questions and surely for a seasoned businessman involved in share dealings he must in the circumstances have known the identity. Nor did I believe PW5 when he said that Tan See Chay did not tell him at the material time that Dawe had an interest in the transaction. I could not help concluding that the transaction was not the innocent stock-broking transaction that PW2 and PW5 tried very hard to make it out to be.

So much by way of preface.

In my view, the claim of the plaintiff essentially revolved round three documents upon which the defendant was alleged to have given a guarantee to the plaintiff. The first was a document entitled GUARANTEE (P18) executed by PW3 who was at the material time a director in the Mosbert group of more than 100 companies and also a director of the defendant which at that point of time was wholly owned by Mosbert Berhad. The second document was an uncompleted charge instrument in Borang 16A (P17) with an annexure, both the charge instrument and the annexure having been executed unattested by PW3 and one Roy Lim Meng Ah, another director of the defendant, in favour of the plaintiff in respect of land held under H.S. (D) L.P. 36/73 for Lot No. 11665 in the Mukim of Durian Sebatang, District of Hilir Perak, in the State of Perak, measuring some 5,000 acres ("the said land"). The third document was what purported to be an undated extract (D22) of a directors' resolution authorising the creation of P17. P18 was worded as follows:

GUARANTEE

In consideration of you, R & I Securities Sdn., purchasing 2,350,667 shares in Mosbert Berhad and 120,000 shares in Town & City Properties Limited now or hereinafter for the account of Hong Kong Securities Limited at such prices you may agree with Hong Kong Securities Limited, I, Choh Yet @ Choh Seng of Mosbert House, Johore Bahru, do hereby guarantee the due performance by Hong Kong Securities Limited of their obligations to you in respect of the purchase of the aforementioned shares. I also agree that the granting of time and other indulgences by you to Hong Kong Securities Limited shall not affect this my guarantee.

Dated this 27th day of May 1975

Signed by the said)
Choh Ye t @ Choh Seng) Sgd.
IN THE PRESENCE OF:) .....
Sgd.
.....
Witness

The relevant portion of P17 was the annexure, also executed unattested with blanks, the material part of which read as follows:

(1) In consideration of the **Chargee** at our request and inducement having agreed to sell to HONG KONG SECURITIES LIMITED:

(a) 1,100,000 shares in MOSBERT BERHAD for the total purchase price of RM752,735 which was due and payable by HONG KONG SECURITIES LIMITED to R & I SECURITIES (SDN.) on **28 November 1975**.

(b) 1,250,667 shares in MOSBERT BERHAD for the total purchase price of US$422,915.92 = RM1,151,581.392 (agreed conversion) which was due and payable by HONG KONG SECURITIES LIMITED to R & I SECURITIES (SDN.) on 30 October 1975.

(c) 120,000 shares in TOWN & CITY PROPERTIES LIMITED for the total purchase price of US$75,093.80 = RM195,243.880 (agreed conversion) which was due and payable by HONG KONG SECURITIES LIMITED to R & I SECURITIES (SDN.) on 30 October 1975.

(ii) In further consideration of the sum of RM1 only now paid by R & I SECURITIES (SDN.) to SYARIKAT TANAMAN DAN PERUSAHAAN SENDIRIAN BERHAD, the receipt of which is hereby acknowledged;

a WE, HEREBY **CHARGE** the land together with building thereon held under document of title known as H.S. (D) L.P. 36/73 Lot 11665 in the Mukim of Durian Sebatang with the payment by HONG KONG SECURITIES LIMITED of the sum of RM1,999,570.27 together with all interests thereon and in addition thereto for all other sums that may be due from HONG KONG SECURITIES LIMITED and or the **Chargor** to the **Chargee** including registration fees stamp duties and Solicitors fees.

b The said sum of RM1,999,570.27 shall be paid by HONG KONG SECURITIES LIMITED and or the **Chargor** to R & I SECURITIES (SDN.) on or before the _____ day of _____ 1975 failing which HONG KONG SECURITIES LIMITED and or the **Chargor** shall pay interests on the above said sum of RM1,999,570.27 at the rate of 12% per annum with monthly rests from the _____ day of _____ 1975 to the date of actual payment or realisation.

c Without prejudice to its right and interest as aforesaid in the event of either HONG KONG SECURITIES LIMITED and or the **Chargor** failing to pay to R & I SECURITIES (SDN.) the said sum of RM1,999,570.27 and or before the day of _____ 1975 R & I SECURITIES (SDN.) shall forthwith become entitled to exercise the rights and remedies granted to a **Chargee** under **s. 254 of the National Land Code** without previous notice to the **Chargor**.

d The **Chargee** shall have all the rights conferred on a **Chargee** under the **National Land Code 1965**.

e The **Chargee** shall be at liberty at its absolute discretion to transfer or assign this **Charge** without reference to the **Chargor** subject to any conditions that the **Chargee** shall in its absolute discretion deems (sic) fit.

f All stamp duties registration fees and Solicitors fees payable herein shall be borne by the **Chargor**.

g Section 245 of the **National Land Code 1965** shall not apply.

The **Chargor** shall pay all Quit Rent assessments and outgoings and all insurance premiums payable pertaining to the said land.

h AS WITNESS the hand and seal of the abovenamed **Chargor** and **Chargee** the day and year first above written.

i Penyempurnaan suratcara ini)
olih SYARIKAT TANAMAN)
DAN PERUSAHAAN SENDIRI-)
ANBERHAD telah diselenggara-)
kan mengikut satu cara yang)

dibenarkan olih perlembagaannya iaitu dengan cara memetrikan Mohor resminya dibawah ini pada ____ haribulan ____ 1975 di hadapan:)

Sgd. Sgd. Common Seal

Penyempurnaan suratcara ini olih R& I SECURITIES (SDN.) telah diselenggarakan mengikut satu cara yang dibenarkan olih perlembagaannya iatu dengan cara memetrikan Cap Mohor resminya dibawah ini pada ____ haribulan ____1975 di hadapan:)

Sgd. Sgd. Common Seal

For purposes of stamp duty under s. 4(3) of the Stamp Ordinance, the principal instrument shall be the **Charge** over the land held under Grant No. 19238 Lot 4532 Mukim of Simpang Kanan in favour of the **Chargees** of even date herewith to secure the principal sum of RM1,999,670.27 and interest thereon and this **Charge** shall be supplemental instrument to complete the same transaction.

(Emphasis added)

D22 is reproduced as follows:

Syarikat Tanaman Dan Perusahaan
Perak Sdn. Bhd.
(Di-Tubuhkan di-Malaysia)
Estate Office:
7th Mile, Jalan Changkat Jong,
Peti Surat 53, Teluk Anson,
Perak
Tel: 621113
Date: ..... 19.....

EXTRACT OF DIRECTORS' RESOLUTION PASSED PURSUANT TO THE ARTICLES OF ASSOCIATION OF THE COMPANY

Resolved:

That the Company do and is hereby authorised:

1. To create a **second charge** on the property known as H.S. (D) LP 36/73 Lot No. 11665, Mukim of Durian Sebatang to Messrs. R & I Security Sendirian as security for the payment by Hong Kong Securities Limited to R & I Securities Sendirian for the sale of

   a. 1,100,000 shares in MOSBERT BERHAD for the total purchase price of RM752,735 **which was due** and payable by HONG KONG SECURITIES LIMITED to R & I SECURITIES (SDN.) on **28 November 1975**.

   b. 1,250,667 shares in MOSBERT BERHAD for the total purchase price of RM1,151,581.392 **which was due** and payable by HONG KONG SECURITIES LIMITED to R & I SECURITIES (SDN.) on 30 October 1975.

   c. 120,000 shares in TOWN & CITY PROPERTIES LIMITED for the total purchase price of RM195,243.880 **which was due** and payable by HONG KONG SECURITIES LIMITED to R & I SECURITIES (SDN.) on 30 October 1975.

   Amounting to RM1,999,570.27 which was sold by R & I SECURITIES SENDIRIAN to HONG KONG SECURITIES LIMITED.

2. To affix the Common Seal of the Company to the relevant documents of Charge in accordance with the Articles of Association of the Company.

CERTIFIED EXTRACT
Sgd.
DIRECTOR

Sgd.
DIRECTOR SECRETARY

(Emphasis added)

The document that was executed first in point of time was P18 which was dated 27 May 1975 and signed by PW3 in the office of SEADCORP in Kuala Lumpur in the presence of Tan See Chay and PW2 who said that PW3's signature was attested by one Chan Wah Kah, a member of the SEADCORP staff. PW3 stated that he had signed it in his capacity as a director of Mosbert Holdings Ltd. and of Mosbert Berhad and also as a director of the defendant. However the language of P18 brooked of no ambiguity and indicated quite clearly that it was signed by PW3 in his personal capacity and I so found. It is to be noted that the personal guarantee was given to the plaintiff for the re-purchase of the two blocks of shares by HKSL at a time when PW3 must have known that no such entity existed in view of his close association with Dawe and he was therefore guilty of fraud making the document null and void (so that the remedy which the plaintiff might have would be an action for damages on the ground of fraud against PW3 who presumably is now a man of straw). It was made to appear in the evidence of PW1, PW2 and PW3 that the plaintiff required, in addition to the personal guarantee P18, landed security in the form of a charge for the due performance of the

re-purchase by HKSL. It was in the evidence of PW2 (who was the person effectively managing the affairs of the plaintiff) that a request was made for a charge and that PW3 agreed to give it and it was prepared by erstwhile solicitor Roger Tan Kim Hock (PW4) of Messrs. Allen & Gledhill on the instructions of Tan See Chay and signed by the two partners of the plaintiff, PW1 and Rahmat, and by two directors of the defendant, PW3 and one Roy Lim Meng Ah, at Mosbert House in Johor Bahru, this event taking place a few days after than the signing of P18 by PW3 in Kuala Lumpur. It was in the evidence of PW4 that when he prepared P17 he had not had sight of the directors' resolution authorising the creation of the charge although he believed the undated extract of the directors' resolution D22 was signed at Mosbert House by PW3 and Roy Lim at the time of the execution of the charge instrument P17. He stated quite definitely that "(t)he purpose of this charge document was to secure a **debt** owing to" the plaintiff by HKSL and he explained that the resolution contained in D22 was only to create a second charge over the said land. I found it significant in this context that no evidence was adduced to show that the registered proprietor of the first charge had consented to produce the document of title for registration of the second charge. When exactly P17 was prepared and executed and when D22 was prepared and signed were crucial questions. I also found it significant that no attempt was made on behalf of the plaintiff to produce the full resolution and that the extract D22 was only produced by the plaintiff and tendered as a defence exhibit during the cross-examination of PW3 after he had been asked to produce the resolution and after he had testified that the defendant had four directors. He was clearly of the view that Dawe's "instruction dispensed with the necessity of a directors' meeting" and stated that there was no directors' meeting as such for the resolution. He thought only two directors signed the resolution. He testified further that the resolution was a circular resolution and reiterated that there was no need for other directors to sign it apart from himself and Roy Lim thus indicating (in the absence of any reliable evidence to the contrary) that the resolution was on the face of it defective in breach of article 122 of the defendant's memorandum and articles of association requiring the signatures of all the directors "for the time being present in Malaysia". In my view D22 containing a resolution purporting to create a second charge in favour of the plaintiff as security for payment by HKSL of RM1,999,570.27 and falsely misrepresenting the existence of HKSL was prepared some time in December 1975 when the caveat (D27) was entered by PW4 at a time when the Mosbert group of companies was already facing financial difficulties as evidenced by the newspaper cuttings D36B - C. I found it significant that a replica of the annexure to P17 accompanying D27 had the date 2 December 1975 inscribed in it as the date of execution of the charge instrument and the annexure. I could not resist the conclusion on the oral and documentary evidence before me that D22 was prepared to lend legitimacy *ex post facto* to the creation of P17. This conclusion was fortified by the statement of claim filed by Patel in respect of its civil suit D15 against the plaintiff wherein it averred that the original date of redelivery of the Mosbert shares to the plaintiff was 28 August 1975 and that on 26 August 1975 the plaintiff had written to Patel requesting deferment of the date of delivery from 28 August 1975 to **28 November 1975** after payment of the deferment charge of RM12,500. In this context I found it significant that recital (a) of the annexure to P17 should have referred to the making of the payment of the purchase price of the Mosbert shares by HKSL to the plaintiff on 28 November 1975 and additionally that D22 referring to the same block of shares should also have referred to the same date 28 November 1975 when the deferment was only requested on **26 August 1975,** 3 months after P17 was purportedly executed and D22 purportedly resolved. I agreed with the submission on behalf of the defendant that the "chronological incongruity" made it incompatible for P17 and D22 to have existed at the end of May or the beginning of June in 1975. In the event, I could not help concluding that P17 and D22 had been brought into existence only in December 1975 after the collapse of the Mosbert group of companies. I therefore found that the plaintiff did not enter into the transaction with Patel and California for the sale and resale of the two blocks of shares as a result of the inducement and guarantee by way of the charge instrument emanating from the defendant *per se* at the material time when only the personal guarantee P18 was executed. Consequently, these two documents P17 and D22 having been executed well after the agreement in May/June 1975 to effect the transaction for the sale and re-sale of the two blocks of shares, the consideration given would have been past consideration and bad in law. In my judgment, even if it could be accepted (which I did not) that P17 was executed at the

material time, the plaintiff could not, because of the close relationship between PW2 and Tan See Chay, have been considered an innocent party in this highly abnormal transaction wherein the main actors Dawe and Sharma were brought in by Tan See Chay as the nature of the transaction must have been known to PW2, the effective manager and representative of the plaintiff. PW2 had struck me as a well-educated, highly intelligent and shrewd person. He also clearly had had wide business experience having been an Executive Director of British and Malaysian Trustees Limited of Singapore and having managed his other businesses in Johor Bahru. By his own admission he had known that the transaction involved Dawe and PW5 because he was present with the plaintiff's partner Rahmat in the SEADCORP office when Tan See Chay spoke to both Dawe and PW5 over the telephone and when, he said, it was decided that a guarantee and security would be given. On his second visit to the office he had met PW3 and Tan See Chay when P18 was typed out and signed by PW3 because he accepted Tan See Chay's word that P18 "was okay" and that the security that was to be given would also be "okay". Having regard to the magnitude and value of the shares involved I could not help concluding that PW2, on behalf of the plaintiff, in entering into the transaction must have fully realized that neither Amos Dawe nor PW3 was in a position to give security on behalf of the defendant without a proper and valid resolution as he must have known that no company could have provided its property as security for the raising of a loan or funds for the benefit of a director. There was no question on the evidence that Dawe through PW3 was acting on his own behalf in raising money needed for his own group of companies and this fact must have been known to PW2 and consequently I found myself agreeing with the submission of the defendant that the plaintiff was aware of the breach of duty on the part of Dawe and PW3 contrary to ss. 131, 132 and particularly s. 133 of the Companies Act 1965 thus rendering the charge transaction illegal and void and the claim unenforceable: (see *Che Wan Development Sdn. Bhd. v. Co-operative Central Bank Bhd.* [1990] 2 MLJ 365 at pp. 369 - 370).

Quite apart from the foregoing, it was common ground that HKSL never existed at the material time, and this was clearly admitted by PW1 and PW3. It was confirmed by PW4 who prepared P17 that the whole basis of the charge was the existence of HKSL and the non-existence of such an entity, in my view, avoided the transaction under s. 21 of the Contracts Act 1950 and made the claim unenforceable.

Further, it was also common ground that as a result of this transaction the sum of US$443,242.91 was remitted by California to the account of Mosbert Bank Ltd. at Tennessee for the purchase of its shares. This payment by California was in respect of the sale of shares in Malaysia and, I agreed with the defendant that the proceeds should in the first place have been transmitted to Malaysia and thereafter, by virtue of the provisions of the Exchange Control Act 1953, they could only have been paid to the credit of Mosbert Bank Ltd. resident outside the scheduled territories with the permission of the Controller. This, clearly from the evidence, was not done contrary particularly to ss. 8 and 9 of the Act rendering the transaction illegal and the claim again unenforceable.

It also occurred to me as highly significant that although the claim by the plaintiff included the two blocks of shares, no proper explanation was furnished on behalf of the plaintiff as to how the Town & City shares came to be registered in the name of a third party since 21 October 1981 as evidenced by the letter D34 from the Registrar for Town & City Properties Limited. In this context I found it pertinent to note that the fact of the transfer to one Hendra Rahardja was at first firmly denied by PW5 until D34 was shown to him. The question remained unanswered as to how much was realized from this transfer in 1981 and as to what became of the proceeds of the transfer. There was more to it than met the eye in the evidence that was presented on behalf of the plaintiff.

The crux of the plaintiff's case was the profferment of a guarantee by the defendant by way of P17 inducing the plaintiff to enter into the transaction. Much depended upon the oral evidence explaining the steps taken by the principal actors in the transaction in order to throw light upon its true nature. The quality of this evidence in turn depended upon the credibility of the principal actors called to testify, namely PW1, PW2, PW3, PW4 and PW5. Of these witnesses, the only witness I found who had any degree of credibility was PW1. I found PW2, PW3, and PW5 rather lacking in forth-

rightness. Even the erstwhile lawyer PW4 was not as forthright as the Court was entitled to expect him to have been. It could not be discerned conclusively from the evidence which party he was actually representing. I found it also significant that when he left practice he went to work for PW5. I could not also help forming the impression that documents were withheld or produced in this case to suit the occasion.

In the light of the foregoing, the suite was dismissed with costs.

SOBENA OFFSHORE INC. SDN. BHD.

v.

TRADERS & CONFIRMERS SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' SITI NORMA YAAKOB J.
[CODE NO. D2-23-2634-88]
30 JANUARY 1992

CONTRACT: Claim by plaintiff for the sum of RM1,248,534.78 - Breach of agreement - Allegation of collateral agreement - Whether valid - Absolute assignment - Revocation - Whether plaintiff entitled to reclaim moneys paid under the assignment.

The plaintiff entered into a written contract with Esso Production Malaysia Incorporated (Esso) to supply couplings as well as provide equipment, services and materials at Esso's factory in Kuantan Port. The contract price was agreed at US$1,132,586.40 and payment was to be made by Esso to the plaintiff progressively.

To supply the materials the plaintiff had, in turn to purchase them from foreign sellers and to finance such purchase, the plaintiff obtained Letters of Credit from a trade financing company in England, McDonald Scales and Co. Ltd. (McDonald Scales) through a confirming house in Malaysia, the defendant, who is also McDonald Scales's agent.

McDonald Scales were obliged to open Letters of Credit in favour of the foreign sellers and the plaintiff would in turn give corresponding bills of exchange in favour of McDonald Scales to mature 180 days from the dates of shipment of the materials and goods ordered.

McDonald Scales issued five Letters of Credit of varying amounts. The plaintiff was to meet payments on the five bills of exchange issued in favour of McDonald Scales. The payments on the five bills of exchange were secured by the personal guarantees of the directors of the plaintiff as well as the corporate guarantees of Sobena Holdings Incorporated Sdn. Bhd.

The plaintiff was only able to meet payment of the last bill of exchange on its due date but not the earlier four bills until well after their due dates owing to the financial difficulties encountered by the plaintiff from September